Filed 5/1/19 In re J.M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.M., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. MATTHEW M., Defendant and Appellant.	F078153 (Super. Ct. No. JD137244-00) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. Raymonda B. Marquez, Judge.

Roshni Mehta, under appointment by the Court of Appeal, for Defendant and Appellant.

Margo A. Raison, County Counsel, and Kelley D. Scott, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Franson, J. and Meehan, J.

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INTRODUCTION

Appellant Matthew M.'s (father) parental rights to baby girl J.M. were terminated at a Welfare and Institutions Code[1] section 366.26 hearing. Father contends the order terminating parental rights should be reversed because the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) and the corresponding state statute were not complied with by the Kern County Department of Human Services (department). We affirm.

FACTUAL AND PROCEDURAL SUMMARY

"Because compliance with the ICWA is the only issue raised in this appeal, our discussion of the facts and procedural background focuses on the facts relevant to compliance with the ICWA." (*In re I.B.* (2015) 239 Cal.App.4th 367, 370.)

The department filed a section 300 petition on behalf of J.M. on April 25, 2017, alleging that the infant came within the provisions of subdivision (b) of that code section. It was alleged that mother and J.M. tested positive for amphetamines and benzodiazepines at the time of the infant's birth. It also was alleged that mother had untreated mental health issues and was experiencing hallucinations. Father was listed as the alleged father.

Father and mother apparently were not living together at the time of detention. The detention report noted that father had a lengthy criminal record, including infliction of corporal injury on a spouse or cohabitant, multiple offenses for possession of a controlled substance, and assault with a deadly weapon other than a firearm.

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[1] References to code sections are to the Welfare and Institutions Code, unless otherwise specified.

On April 27, 2017, mother filed a parental notification of Indian status form, ICWA-20 (ICWA-020), that indicated she had no Indian ancestry. Father also filed a form ICWA-020 stating he may have Cherokee and Choctaw ancestry.

At the April 28, 2017 detention hearing, father was declared J.M.'s presumed father. Discussion turned to compliance with ICWA, and father's counsel indicated father had some "information about a roll number." The juvenile court directed father to contact the department before the end of the week and provide the roll number and any other information that might assist with providing proper notice.

A paralegal with the department contacted the paternal grandmother to obtain further information on the family's Indian heritage. The paternal grandmother stated father's Indian ancestry was through the Choctaw tribe and provided an enrollment number. She also gave the paralegal the name of father's biological father, the paternal grandfather, the paternal great-grandfather, and identifying information for all three men. The paternal grandmother indicated all their Indian ancestry was through the Choctaw tribe.

On May 1, 2017, the social worker telephoned the Choctaw Nation and verbally provided all the information the department had been given in order to determine whether J.M. was an Indian child. Additionally, that same day, the ICWA-030 form, notice of child custody proceedings for an Indian child (ICWA-30), was mailed to the Bureau of Indian Affairs (BIA), Secretary of the Interior (Secretary), and the three federally recognized Choctaw tribes by certified mail, return receipt requested. The written forms included the information about J.M.'s paternal relatives that had been provided by the paternal grandmother.

The BIA and Secretary acknowledged receipt of the ICWA-030 form. The Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, and the Mississippi Band of Choctaw Indians all responded that J.M. was not a member of, and not eligible for enrollment in, the tribe.

A social study prepared for the jurisdiction hearing noted that father had an older child, Micah, who had been the subject of a dependency petition and placed with a foster family. The child was under a legal guardianship with the foster family. The social worker reviewed the dependency case file of Micah and found that on April 10, 2012, the juvenile court found that ICWA did not apply to Micah.

At the June 26, 2017 jurisdiction hearing, the juvenile court questioned the department on why the Cherokee tribes had not been provided with a form ICWA-030 notice. The department's counsel responded that all the information obtained by the paralegal from father's family indicated that Indian ancestry was only through the Choctaw tribe. Also, counsel represented that he had reviewed the dependency file in the case of J.M.'s half sibling, Micah, and the juvenile court file reflected that father claimed Indian heritage through the Cherokee tribes in that case, but the juvenile court found that ICWA did not apply.

The juvenile court clarified that there had been a previous notification to the Cherokee tribes in Micah's case based on father's claim of Cherokee ancestry in Micah's dependency, and it was found that ICWA did not apply. In the current dependency for J.M., paternal relatives claimed J.M.'s Indian ancestry was through the Choctaw tribes, and notice was given to the Choctaw tribes. Father's counsel had "nothing to add" and submitted the ICWA issue.

Father spoke up at the jurisdiction hearing and questioned whether the information about his birth father had been included in the ICWA-030 notice. The juvenile court responded that the name, birth date, and enrollment number provided for father's birth father had been included in the notice. The juvenile court asked father if he had further information, and father stated he had been told by his father, J.M.'s paternal grandfather, that he had "Cherokee, Choctaw, and Blackfoot" ancestry.

The juvenile court asked if father had "reason to believe that there's other information the Court should be investigating." Father responded, "Not that I know of

right now." The juvenile court found that "based on the evidence presented," ICWA did not apply.

The juvenile court found that J.M. was a child described in section 300, subdivision (b) at the jurisdiction hearing. At the October 5, 2017 disposition hearing, J.M. was continued in out-of-home placement and a family reunification plan was adopted.

As of May 2018, father had not enrolled in any counseling components of his case plan and had not submitted to drug testing because he had been incarcerated. Father was incarcerated from February 3, 2018 until April 23, 2018, then arrested on April 28, 2018, and remained in custody. Mother also failed to drug test and failed to enroll in the counseling components of her case plan.

Reunification services for both parents were terminated on May 16, 2018. The section 366.26 report recommended termination of parental rights.

At the section 366.26 hearing held on September 11, 2018, father still was incarcerated. The juvenile court terminated parental rights and set a permanent plan of adoption.

Father filed a timely notice of appeal from the section 366.26 order on September 28, 2018.

DISCUSSION

The Supreme Court issued its decision in *In re Isaiah W.* (2016) 1 Cal.5th 1, 6, 15, holding that a parent can raise the issue of the ICWA compliance at any stage of the proceedings, including in an appeal.

Section 224.3 and California Rules of Court, rule 5.481(a),[2] impose upon both the juvenile court and the agency "an affirmative and continuing duty to inquire" whether a dependent child is or may be an Indian child. (See *In re W.B.* (2012) 55 Cal.4th 30, 53.)

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[2] Further references to rules are to the California Rules of Court.

The social worker must ask the child, if the child is old enough, and the parents, if the child has Indian heritage. (Rule 5.481(a)(1).) Upon a parent's first appearance in a dependency proceeding, the juvenile court must order the parent to complete a form ICWA-020. (Rule 5.481(a)(2).) "If the parent, Indian custodian, or guardian does not appear at the first hearing, or is unavailable at the initiation of a proceeding, the court must order the person or entity that has the inquiry duty under this rule to use reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered the parent, Indian custodian, or guardian to complete form [ICWA-020]." (Rule 5.481(a)(3).)

The ICWA

"Congress enacted the ICWA 'to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children in foster or adoptive homes that will reflect the unique values of Indian culture.' " (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39; *In re Levi U.* (2000) 78 Cal.App.4th 191, 195.) An " 'Indian child' is defined as a child who is either (1) 'a member of an Indian tribe' or (2) 'eligible for membership in an Indian tribe and … the biological child of a member of an Indian tribe ….' (25 U.S.C. § 1903(4).)" (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 338.) The ICWA applies only to federally recognized tribes. (25 U.S.C. § 1903(8); *In re Jonathon S., supra*, at p. 338; *In re B.R.* (2009) 176 Cal.App.4th 773, 783; *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 166-168.)

In every dependency proceeding, the agency and the juvenile court have an "affirmative and continuing duty to inquire whether a child … is or may be an Indian child.…" (§ 224.2, subd. (a); rule 5.481(a); *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165 (*Gabriel G.*); *In re W.B., supra*, 55 Cal.4th at p. 53.) Once the court or agency "knows or has reason to know that an Indian child is involved, the social worker … is required to make further inquiry regarding the possible Indian status of the child,

and to do so as soon as practicable …." (*Gabriel G., supra,* at p. 1165; rule 5.481(a)(4).) The agency's duty of "further inquiry" requires " 'interviewing the parents, Indian custodian, and extended family members …, contacting the Bureau of Indian Affairs … [and contacting] the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.' " (*Gabriel G., supra,* at p. 1165; rule 5.481(a)(4).)

The ICWA applies to children who are eligible to become, or who are members of a tribe, but does not limit the manner by which membership is to be defined. (*In re Jack C.* (2011) 192 Cal.App.4th 967, 978.) A "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn. 32.) The tribe's determination that a child is a member of or eligible for membership in the tribe is conclusive. (§ 224.2, subd. (h).)

Standard of Review

Where, as here, the trial court has made a finding that the ICWA is inapplicable, the finding is reviewed under the substantial evidence standard. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Karla C.* (2003) 113 Cal.App.4th 166, 178–179.) Thus, we must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we must indulge all legitimate inferences in favor of affirmance. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.) We review compliance with the ICWA notice requirements under the harmless error standard. (*In re E.W.* (2009) 170 Cal.App.4th 396, 402–403; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)

Analysis

Section 224.3, subdivision (a) requires that notice be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child's tribe. Courts have construed this language to require

"notice to *all* federally recognized tribes within the general umbrella identified by the child's parents or relatives." (*In re O.C.* (2016) 5 Cal.App.5th 1173, 1183; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1202.) Notice is sufficient if there was substantial compliance with ICWA. (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566.)

Here, father filled out the ICWA-020 form indicating he may have Cherokee and Choctaw ancestry. When J.M.'s paternal grandmother was interviewed to obtain more information, she indicated father had Choctaw ancestry only. After being noticed, all three federally recognized Choctaw tribes responded that J.M. was not a member of, and not eligible for membership in, the tribe.

In an earlier dependency proceeding involving another child of father's, Micah, the juvenile court found that ICWA did not apply to Micah. In Micah's case, the Cherokee tribes had been notified of the proceedings.

Father contends notice was inadequate because notice was not given to the Cherokee tribes in J.M.'s case. However, notice to the Cherokee tribes need only be given if there is reason to know that J.M. might be eligible for membership in a Cherokee tribe. (§ 224.3, subd. (a).) Since Micah was not eligible for membership in any Cherokee tribe based upon father's ancestry, it follows that J.M. could not be eligible for membership in a Cherokee tribe based upon father's ancestry. Thus, any failure to notice the Cherokee tribes in J.M.'s case was harmless. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.)

After father was informed that the Choctaw tribes responded that J.M. was not eligible for membership, was reminded that the Cherokee tribes had found Micah was not eligible for membership based upon father's ancestry, and father's counsel had submitted on the ICWA issue, father suddenly remembered that he might have Blackfoot ancestry. The ICWA-030 notice was sent to the Secretary and the BIA and received. The record is devoid of any response from the BIA or Secretary indicating J.M. was eligible for membership in the Blackfoot tribe, or any federally recognized tribe.

To delay the proceedings, or conditionally reverse and remand for further notice, would not serve the purpose of the ICWA. Paternal grandmother specifically identified father's ancestry as only Choctaw and the Choctaw tribes were notified; they each responded J.M. was not eligible for membership. The Cherokee tribes were notified in Micah's dependency case and the juvenile court found ICWA did not apply to Micah. The BIA and Secretary were served with the ICWA-030 notice in J.M.'s case and did not respond.

Father had no more information to provide the juvenile court about his possible Indian ancestry, other than what was included in the ICWA-030. Without more information, the department is not required to send a multitude of notices to successive tribes identified by father after the tribes father identified on the ICWA-020 form have found no basis for membership based upon father's ancestry and the BIA and Secretary have been noticed, unless there is some additional information providing a basis to believe the child may be eligible for membership in a tribe. (See § 224.3, subd. (a).) To require such an approach would not serve the purpose of protecting tribal ties and Indian cultural heritage, but rather would bury specific Indian tribes in the task of shifting through a barrage of notices with little to no chance that they actually have an interest in the noticed proceeding. Instead, in such a case, the notice requirement may be satisfied by sending notice to the BIA, which the department did. (See *In re C.D.* (2003) 110 Cal.App.4th 214, 227.)

Since the relevant tribes, BIA, and Secretary were notified, father's claim of inadequate ICWA notice is without merit.

DISPOSITION

The order terminating parental rights and setting a permanent plan of adoption for J.M. is affirmed.